Supreme Court, U.S.
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In The
# Supreme Court of the United States

URBAN INVESTMENT TRUST, INC.
and JOHN TERZAKIS,

*Petitioners,*

vs.

ANDERSON-DUNDEE 53, L.L.C., *et al.*,

*Respondents.*

**On Petition For Writ Of *Certiorari***
**To The Illinois Appellate Court, First District**

## PETITION FOR WRIT OF *CERTIORARI*

EUGENE E. MURPHY, JR.
(*Counsel of Record*)
MURPHY & HOURIHANE, L.L.C.
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
(312) 606-9300

MARK W. SCHROEDER
Attorney at Law
7450 Quincy St.
Willowbrook, Illinois 60527
(630) 203-0710

*Attorneys for Petitioners*
*Urban Investment Trust, Inc.*
*and John Terzakis*

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OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED FOR REVIEW

1. Can a trial court, consistent with the Due Process Clause of the fourteenth amendment, which has failed to assert *in rem* jurisdiction over an identified *res*, hold a corporation or its corporate officer in contempt of court for the failure of the corporation to turn over millions of dollars in the face of uncontradicted evidence that neither the corporation nor the corporate officer possessed or controlled the money and thus could not comply with the turnover order?

2. Can a corporation or its officer, consistent with the Due Process Clause of the fourteenth amendment and the Excessive Fines Clause of the eighth amendment, be fined $2,500 per day for failure of the corporation to comply with a turnover order when more than 160 days of the 229-day period for which contempt fines were levied occurred solely as a result of the trial court's failure or refusal to hear the matter more speedily?

3. Can a corporate officer, consistent with the Due Process Clause of the fourteenth amendment, personally be liable for a judgment against the corporation prior to the time the corporate officer is named in a complaint and service of process is had upon him, or prior to the time a trial is had against the corporation?

## PARTIES TO THE PROCEEDING

Petitioner Urban Investment Trust, Inc. ("Urban") was a defendant, and petitioner John Terzakis was a non-party-respondent (later to be named a defendant) in proceedings brought by plaintiffs Anderson Dundee 53, L.L.C., *et al.*, in the Circuit Court of Cook County, Illinois. Urban and Terzakis were appellants before the Illinois First District Court of Appeals, and petitioners for leave to appeal to the Illinois Supreme Court. Plaintiffs and the receiver appointed by the trial court, Bruce D. Heller, were appellees before the Illinois First District Court of Appeals and respondents on the petition for leave to appeal to the Illinois Supreme Court, and are named as respondents herein.

The plaintiffs are Anderson Dundee 53 L.L.C.; Winifred Boffo-McCoy; Carl Boffo; Thomas Caylor; Zorina Caylor; Clayton and Barbara Citrano; DC Compass, L.L.C.; Edmunds 1500 Dundee, L.L.C.; Hannah 1500, L.L.C.; Howes 1500 Dundee, L.L.C.; Huey 1500 Dundee, L.L.C.; Kelley 1500, L.L.C.; Kluckhohn 1500 Dundee, L.L.C.; Martinez 1500 Dundee L.L.C.; Lawrence McCune; Barbara McCune; James D. and June M. Mercer; Mockingbird Resources L.L.C.; 1500 West Dundee Moreland, L.L.C.; Nelson Roofing 1500 Dundee, L.L.C.; Oak Properties Dundee 53, L.L.C.; Ralph C. Ogden III; Joni F. Ogden; Orth 1500 Dundee, L.L.C.; Donald R. and Carlee Petelle; Roger and Carol Poirier; CW Purdom 1500 Dundee, L.L.C.; PW Purdom 1500 Dundee L.L.C.; Gilbert Reese; Frederick L. Richards and Jennifer Goodman; SFS, L.L.C.; Santini 1500 Dundee, L.L.C.; Suchy 1500, L.L.C.; TF Real Estate 1500 L.L.C.; Wentworth 1500 Dundee, L.L.C.; and Redd Rasmussen 1500 L.L.C.

**PARTIES TO THE PROCEEDING** – Continued

Pursuant to Rule 29.6 of the Rules of this Court, there is no parent or publicly held company owning 10% or more of Urban's stock.

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*Anderson Dundee 53, L.L.C., et al. v. John Terzakis, et al.*, 363 Ill. App. 3d 145, 298 Ill. Dec. 863, 841 N.E.2d 6 (1st Dist. December 2, 2005). Appendix A-1-25.

## BASIS FOR JURISDICTION

The Illinois Appellate Court, First District, entered its initial opinion on October 14, 2005. Appendix A-1-22. On December 2, 2005, the First District entered an order denying a petition for rehearing filed by Urban and Terzakis, and supplemented its opinion on denial of rehearing. Appendix A-22-25. On March 29, 2006 the Illinois Supreme Court denied the discretionary petition for leave to appeal brought by Urban Investment Trust, Inc. and John Terzakis. Appendix A-49. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.1 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) and Rule 13.1 of this Court to review on a writ of *certiorari* the decision of an intermediate appellate State court following that State's highest court denying discretionary review thereof.

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, amend. VIII.

Constitution of the United States, amend. XIV, § 1.

## STATEMENT OF THE CASE

Plaintiffs are some of the tenant-in-common owners of commercial property in Arlington Heights, Illinois known as the "Honeywell Property." Plaintiffs sued the so-called master tenant of the property and several other entities in the Circuit Court of Cook County, Illinois on January 2, 2002 for an accounting of monies that allegedly were to have been paid for the Honeywell Property's real estate taxes and insurance. Plaintiffs amended their original complaint on March 20, 2002 to specifically name petitioner Urban Investment Trust, Inc. ("Urban") as a defendant. Plaintiffs allege Urban is the parent of the previously named defendant entities.

Previously, on February 20, 2002, Elaine 1500, L.L.C. and Ilene 1500, L.L.C. – neither of which was a party to that Cook County lawsuit – propounded "document requests" to the defendants (which at that point did not include either petitioner) under Illinois Supreme Court Rule 214 which permits "[a]ny party" to demand documents from "any other party" (much like Federal Rule of Civil Procedure 34). On June 24, 2002 these non-parties filed a motion to compel document production, which was heard by Judge Aaron Jaffe on June 27, 2002. Defendants objected to the standing of the non-parties to demand documents under Illinois Supreme Court Rule 214, but the trial court ordered four individuals who also were not parties – including petitioner John Terzakis – to testify about some of the Honeywell Property's financial transactions and the documents relating thereto.

During evidentiary hearings commencing July 1, 2002, the trial court excluded John Terzakis from the courtroom except while he was testifying. At this time,

John Terzakis was not named a party to the lawsuit; he had been ordered to appear in his capacity as an officer of Urban.

On July 10, 2002 and again on July 23, 2002, a receiver appointed by the court to oversee the Honeywell Property filed motions for "turnover of funds" which he claimed Urban had somehow misappropriated. Neither of the turnover motions nor any amendment thereto specifically identified the then-present location or repository of any of "the funds" in question. Moreover, neither of the turnover motions sought to compel John Terzakis or any other individual to personally turn over any funds. On July 15, 2002, the trial court effectively merged the receiver's motion for turnover of funds into the hearing already underway on the non-parties' motion to compel.

On December 12, 2002 the trial court entered a turnover order requiring Urban "and its officers" to deposit $3,336,423.01 with the receiver. Appendix A-47. This order did not indicate where that money was supposed to come from.

At no point in the proceedings did the Circuit Court of Cook County attach, garnish or otherwise seize or exert *in rem* jurisdiction over any identified *res* of funds.

On December 19, 2002, without any prior notice or opportunity to be heard, the trial court also entered an order (which petitioners did not know about until they compiled the record on their State court appeal) stating "that the obligation to turn over $3,336,423.01 to the Receiver Bruce Heller is a 'joint obligation' of Urban Investment Trust and its officers, Rudy Mulder and John Terzakis, which may be enforced against all of them." Appendix A-43. The receiver's counsel did not file the

actual motion seeking this relief until the next day. That motion did not include any notice of motion; it did not name any parties as specific recipients (in contrast to other certificates of service); and it purported to have been deposited into the mail at or before 5 p.m. on the exact same day as the order in question had been entered.

At the time of those proceedings, and still today, Circuit Court of Cook County Rule 2.1(c) required two days' notice for motions hand delivered to counsel or five days' notice if mailed.

On January 3, 2003 the December 12, 2002 turnover order was amended again, this time "*nunc pro tunc* to identify John Terzakis, Rudy Mulder and Roxanne Gardner as the officers to whom the order applies." Appendix A-42.

On January 13, 2003 the trial court issued a rule to show cause against Urban and its officers, including petitioner Terzakis, for failing to comply with the December 12, 2002 turnover order as amended.

On January 24, 2003 plaintiffs filed their second amended complaint, which named individual defendants, including petitioner John Terzakis, for the first time. The individual defendants appeared and moved to dismiss the second amended complaint on February 27, 2003. The trial court stayed all of its proceedings except contempt proceedings on the turnover order, so it did not rule upon the motion to dismiss or the motions for substitution of judge at a matter of right filed by certain of the newly named defendants.

On March 31, 2003 the trial court found Urban's officers in contempt (including Roxanne Gardner whom

the trial court acknowledged in its order no longer was an officer) and fined them $2,500 per day until $3,336,423.01 was deposited with the receiver or until they provided "a detailed financial history" to the satisfaction of the court of what happened to the money. Appendix A-40. For the next several months, the court heard testimony about Urban's financial history and defendants' inability to comply with the order, and acknowledged defendants' argument that the corporation did not possess the money to turn over. The trial court then entered judgment on November 26, 2003 against Urban and the individuals for 229 days of contempt, or $572,500. Appendix A-27-34. Over 160 days of this period was based solely on the trial court's failure or refusal to schedule the proceedings more speedily.

From this final order Urban and Terzakis unsuccessfully, and Gardner successfully, appealed. Appendix A-20. The Illinois First District Court of Appeals reversed the contempt judgment against Gardner because she was not an officer at the time of the turnover order and accordingly had no ability to make the corporation do anything, and thus should not have been found in contempt based on Urban's purported failure to comply with the turnover order. Urban and Terzakis renewed their arguments, which had been unsuccessful at the trial court level, that there was no repository of money which could be "turned over," and therefore the trial court lacked an identifiable *res* as well as subject matter or *in rem* jurisdiction to enter the turnover order in the first place. However, the Illinois First District Court of Appeals did not address this argument, premised on *Maggio v. Zeitz,* 333 U.S. 56 (1948), because it held that it lacked appellate jurisdiction to do so. Appendix A-13. Petitioners pointed out in their rehearing petition that an Illinois appellate court always has

jurisdiction to examine the subject matter jurisdiction of the trial court, and also asserted that the appellate court failed to address the dispositive holding of this Court in *Maggio*. The petition for rehearing was denied, without the appellate court ever addressing the trial court's subject matter jurisdiction to issue the *in rem* turnover order in the first place. And while the supplemental opinion on denial of rehearing did mention the *Maggio* case, it did not address that part of the case petitioners relied upon which deals with the Due Process Clause and petitioners' challenges to the constitutionality of the turnover order and resulting contempt judgment. Appendix A-24.

Urban and Terzakis also renewed their argument, which was unsuccessful at the trial court level, that punishing them for over 160 days at $2,500 per day based on the trial court's inability to schedule an earlier hearing was excessive. The Illinois First District Court of Appeals ruled that petitioners had waived this argument by not citing any case authority for it. Appendix A-21. In their rehearing petition, Urban and Terzakis argued that the issue was one of first impression, and therefore the failure to cite prior case precedent could not constitute a waiver. The Illinois First District Court of Appeals iterated its previous holding that the petitioners' failure to cite authority forfeited review of the issue and rejected petitioners' argument on this point. Appendix A-23.

Finally, John Terzakis renewed his arguments, unsuccessful at the trial court level, that to make him personally liable for a judgment prior to the time he was named in a complaint and served with process, or prior to the time the corporation was permitted to defend the claims at trial, violated the Due Process Clause of the fourteenth amendment. The Illinois First District Court of Appeals stated

that it would not review the December 19, 2002 order at issue because the order had no effect on the disposition of the contempt charge. Appendix A-22. Accordingly, thus far, the $3,336,423.01 judgment has not been subject to any actual appellate review.

On March 29, 2006 the Illinois Supreme Court declined to allow Urban and Terzakis leave to file a discretionary appeal. Appendix A-49.

Presently, plaintiffs seek not only to enforce the $572,500 contempt judgment against John Terzakis, but also are requesting $131,873.20 in statutory interest on the judgment, and are requesting the trial court enter a supplemental contempt judgment of $2,337,500 against John Terzakis for contempt fines accruing from November 27, 2003 through June 14, 2006, the period during which petitioners' appeal has been pending. In total, the contempt fines plaintiffs presently are seeking to have the trial court impose against John Terzakis exceed $3 million.

Petitioners Urban Investment Trust, Inc. and John Terzakis respectfully request that this Court grant their petition for a writ of *certiorari* to conform the trial and appellate court rulings to Supreme Court precedent under both the Due Process Clause of the fourteenth amendment and the Excessive Fines Clause of the eighth amendment.

## ARGUMENT

### A. A Contempt Judgment against a Corporation and Its Officer Cannot Stand If the Trial Court Lacked Jurisdiction to Enter the Underlying Turnover Order in the First Place, or Compliance with the Turnover Order Was Shown to Be Impossible.

#### 1. Importance of Supreme Court Review.

This Court should grant *certiorari* pursuant to Supreme Court Rule 10(c) because the decisions of the trial and appellate courts conflict on two separate levels with the decision of this Court in *Maggio v. Zeitz,* 333 U.S. 56 (1948): *first, Maggio* establishes that the trial court lacked subject matter jurisdiction to enter the turnover order in the first place because there was no identified *res* to be turned over and thus nothing existed upon which *in rem* jurisdiction could attach; and *second,* the "flagrant abuse of process" which this Court previously stated "should not be necessary to say" does need to be iterated because what had been decried in *Maggio* is exactly what happened below.

#### 2. The Due Process Clause Precludes Contempt Relief for a Void Order Such as a Turnover Order with Nothing to Turn Over.

An identified *res* is the *sine qua non* for any *in rem* proceeding, and since there was no *res* before the trial court, the trial court had no *in rem* jurisdiction. This is the holding of *Maggio v. Zeitz,* 333 U.S. 56 (1948), in which this Court considered turnover orders in the bankruptcy context:

> [I]t is essentially a proceeding for restitution rather than indemnification, with some characteristics of a proceeding *in rem*; *the primary condition of relief is possession of existing chattels or their proceeds being capable of being surrendered by the person ordered to do so.* It is in no sense based on a cause of action for damages for tortious conduct such as embezzlement, misappropriation or improvident dissipation of assets.
>
> The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding.

333 U.S. at 63-64 (emphasis added). In that case, this Court vacated a contempt judgment based on a turnover order because it had not been proven that, *at the time of the turnover order*, the respondent had possession of the machinery to be returned. *Id.*

At the time of the turnover order *sub judice*, neither Urban nor any of its officers had possession of the disputed monies. Indeed, since a million dollars of the disputed monies was in the form of "cancellation of a promissory note," which is a bookkeeping or accounting entry, there obviously could never have been a tangible, attachable repository of that "sum." Because an identified repository of funds was not brought into the jurisdiction of the trial court, the trial court never attained *in rem* jurisdiction over any *res* and therefore lacked subject-matter jurisdiction to enter the turnover order. The turnover order and all orders entered in supposed enforcement thereof should be vacated in their entirety.

### 3. A Corporation or Its Corporate Officer Cannot Be Held in Contempt of a Turnover Order Neither Is Capable of Performing.

The evidence before the trial court was undisputed on one key point: at the time the turnover order was entered, and thereafter, neither Urban nor its officer had custody or possession of the disputed monies. It was not sitting in some bank account, or in some safe or repository that could be subject to levy or attachment. It was only a *claim* to money, not any tangible money.

The trial court found petitioners in contempt for not turning over approximately $3.3 million dollars to the receiver. However, at no point did the trial court make a finding, and at no point was any evidence introduced, to show that either alleged contemnor actually had custody or control of the disputed monies at that time so that either was in a position to abide the turnover order and deposit the monies as ordered. Thus, what the trial court did was punish petitioners for failing to do something which was impossible for them to do.

Such punishment is unconstitutional, at least since the abolition of debtors' prison. The exact issue arose in *Maggio v. Zeitz*, 333 U.S. 56 (1948):

> The nature and derivation of the [turnover] remedy make it clear that it is appropriate *only* when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding.

333 U.S. at 63-64 (emphasis added). The parallels between *Maggio* and the matter *sub judice* are compelling. Joseph Maggio had been president of Luma Camera Service, Inc.,

the debtor in bankruptcy. During the bankruptcy proceeding, the trustee sought and received an order of court requiring Maggio to turn over certain equipment which the trustee claimed were assets of the bankruptcy estate. Maggio failed to turn it over and was held in contempt. The only evidence in the record about the equipment showed that Maggio possessed it over a year before the turnover order was entered.

The Supreme Court ruled that a turnover order must be supported by "clear and convincing evidence," including the fact that the assets were taken from the bankrupt estate and that they indeed were in the possession of the person being proceeded against. *Id.* at 64. Neither being present in that case, this Court vacated the turnover order:

> It should not be necessary to say that it would be a flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed.

*Id.* By punishing petitioners here for failing to obey a turnover order which was beyond their capability of performing, the trial court violated petitioners' rights to due process.

In addition, because it was impossible for the corporation to turn over funds not in its possession, the $2,500 a day fine cannot be viewed as "coercive" in the sense that it was "designed to secure future compliance with judicial decrees." *Spallone v. United States,* 487 U.S. 1251, 1257 (1988) (Marshall, J., concurring in part). It was akin to a civil sanction, and "that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes,

[which] is punishment, as we have come to understand the term." *Austin v. United States,* 509 U.S. 602, 610 (1993). The simple reality is that a half-penny fine would work as well as a million-dollar fine at precipitating the desired-for corporate action (deposit of $3.3 million into court): it would not work at all if the corporation had no money, which the trial court freely conceded it did not.

"To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Automobile Insurance Co. v. Campbell,* 538 U.S. 408, 417 (2003) (citation omitted). The result should be the same whether viewed from the framework of the eighth or the fourteenth amendment: half a million dollar fine against a corporation and its officer because his corporation did not do something it could not do is excessive punishment and simply unjust.

## B. It Is Excessive to Punish a Corporate Officer for Contempt Based on the Trial Court's Inability to Schedule Proceedings More Speedily.

### 1. Importance of Supreme Court Review.

This Court should grant *certiorari* pursuant to Supreme Court Rule 10(c) because the trial and appellate courts have decided an important question that should be decided by this Court, specifically, whether the Excessive Fines Clause and Due Process Clause preclude imposition of a fine which nearly quadrupled strictly as a result of the trial court's refusal or failure to conduct contempt proceedings more speedily.

### 2. A Fine Which Grows Due to No Improper Activity of the Putative Contemnor Is Not "Coercive" and Constitutes Improper Punishment.

Petitioners were held in contempt for failing to turn over $3.3 million during the 229 days the contempt proceedings were ongoing. However, for 162 of those days, no testimony was taken on the contempt proceeding due to scheduling difficulties of the trial court. Petitioners argued that they should not be punished $2,500 a day when the delay was not the result of any contumacious act on their part. However, the appellate court considered this issue waived because no authority had been cited for it. Appendix A-21 and 23.

There is not a reported decision in this country which deals with a contempt judgment being more-than-trebled or nearly-quadrupled based on the court's failure or refusal to conclude the hearings promptly, and the issue is one of first impression. "Since the issue is one of first impression, contemnor has not waived it by failing to cite relevant case law." *Marsh v. Lake Forest Hospital*, 166 Ill. App. 3d 70, 75 (2d Dist. 1988). Accordingly, it was error for the appellate court to treat the issue as waived and not address it, and simple fairness requires that this harsh punishment be vacated.

While the precise issue has not been decided, the "Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996) (citations omitted). This is even more true in the case *sub judice* because whether or not any of the defendants is a tortfeasor is an issue yet to be tried. Further, since a fine not linked to the putative contemnor's

actions serves no purpose, it is "grossly excessive" as a matter of law, and "constitutes an arbitrary deprivation of property." *State Farm Automobile Insurance Co. v. Campbell,* 538 U.S. 408, 417 (2003) (citation omitted).

### C. A Corporate Officer Cannot Personally Be Held Liable for a Corporate Debt in the Absence of a Complaint and Service of Process upon Him.

#### 1. Importance of Supreme Court Review.

This Court should grant *certiorari* pursuant to Supreme Court Rule 10(c) because the decisions of the trial and appellate courts conflict with numerous decisions of this Court, starting with *Levy v. Fitzpatrick,* 40 U.S. (15 Pet.) 167 (1841), and *Pennoyer v. Neff,* 95 U.S. (5 Otto) 714 (1877).

#### 2. The Due Process Clause Precludes Railroading.

With respect to the personal jurisdiction issue raised by John Terzakis, the appellate court only considered jurisdiction over him in his capacity as a corporate officer. Appendix A-16. But the trial court went beyond a contempt fine against a corporate officer for his alleged participation in the corporation's alleged failure to abide a turnover order. On December 19, 2002 the trial court entered a $3.3 million liability judgment against Terzakis personally, as if it had conducted a piercing the corporate veil trial and found him jointly and severally liable for the corporation's debts, notwithstanding the fact that no complaint had been tried against the corporation and no complaint was on file naming John Terzakis and seeking to have him held liable for the corporation's debts:

> The Order of December 12, 2002 is hereby clarified to reflect that the obligation to turn over $3,336,423.01 to the Receiver Bruce Heller is a joint obligation of Urban Investment Trust and its officers, Rudy Mulder and John Terzakis, which may be enforced against any or all of them.

Appendix A-43.

Such impressment of liability can only be entered by a court with personal jurisdiction over the defendant. That requires two things which did not occur below, a complaint naming the defendant, and due service upon him. Entry of judgment in the absence of a complaint and proper service of process violates John Terzakis' right to due process. *Levy v. Fitzpatrick*, 40 U.S. (15 Pet.) 167 (1841); *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877). Indeed, the trial court treated John Terzakis as a witness at the evidentiary hearings for the turnover order, excluding him from the courtroom when he was not testifying. Yet he was treated as a party by the trial court when it entered its judgment order against him.

The appellate court refused to consider this challenge because the December 19, 2002 order was not listed on the notice of appeal, and because the order was said to have no effect on the disposition of the contempt charge. Appendix A-22. There are three problems with this abstention. *First*, the December 19, 2002 order did not have to be listed in the notice of appeal because it was not a final order and would indeed be modified several times before entry of the final order from which appeal eventually and appropriately had been sought. A notice of appeal necessarily raises "all prior non-final orders and rulings which produced the

judgment." *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979) (citation omitted).

*Second*, the December 19, 2002 order was not discovered by petitioners' counsel until after the notices of appeal were filed and the record prepared. This was not due to any neglect of petitioners or their counsel; the reason they did not know about this order is that the receiver's counsel had to have submitted it to the trial judge without any notice, or an opportunity to be heard, and without thereafter serving it upon any of their counsel. This is proven by the record itself which shows that the order was entered the day *before* a purported motion for its entry was filed by the receiver's counsel, which purported motion suspiciously had no corresponding notice of motion, suspiciously named no parties in its certificate (in contrast to prior certificates) and purported to have been mailed on or before 4 o'clock p.m. on the very day the *ex parte* order was entered.

*Third*, irrespective whether or not the personal jurisdiction challenge was appropriately brought up in direct fashion through a timely-filed notice of appeal, it was incumbent on the appellate court to consider the lower court's jurisdiction once collaterally attacked. *See, e.g., City of Chicago v. Fair Employment Practices Commission*, 65 Ill. 2d 108, 112-15 (1976). As of the submission date of this petition for the writ of *certiorari*, the state court plaintiffs still have not stated a viable cause of action against John Terzakis, who has moved to dismiss their fourth amended complaint. It is fundamentally unfair to seek to enforce a multi-million dollar judgment against an individual before a claim has been stated against him. Furthermore, the appellate court's refusal to consider the issue based on the supposed lack of appellate

jurisdiction counsels in favor of granting *certiorari* herein. *Compare Liner v. Jafco*, 375 U.S. 301, 304-306 (1964).

## CONCLUSION

Based on the foregoing, Urban Investment Trust, Inc. and John Terzakis respectfully request that this Court grant their petition for a writ of *certiorari*. Review of the Circuit Court of Cook County, Illinois and Illinois First District Appellate Court decisions through a writ of *certiorari* will yield a result that conforms to Supreme Court precedent.

June 27, 2006

Respectfully submitted,

EUGENE E. MURPHY, JR.
*(Counsel of Record)*
MURPHY & HOURIHANE, L.L.C.
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
(312) 606-9300

MARK W. SCHROEDER
Attorney at Law
7450 Quincy Street
Willowbrook, Illinois 60527
(630) 203-0710

*Attorneys for Petitioners*
*Urban Investment Trust, Inc.*
*and John Terzakis*

841 N.E.2d 6

In the Appellate Court of Illinois
First Judicial District

SIXTH DIVISION
December 2, 2005

No. 1-03-3708

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| ANDERSON DUNDEE 53 L.L.C.; WINIFRED BOFFO-MCCOY; CARL BOFFO; THOMAS CAYLOR; ZORINA CAYLOR; CLAYTON and BARBARA CITRANO; D C COMPASS, LLC; EDMUNDS 1500 DUNDEE, LLC; HANNAH 1500, LLC; HOWES 1500 DUNDEE, LLC; HUEY 1500 DUNDEE, LLC; KELLEY 1500, L.L.C.; KLUCKHOHN 1500 DUNDEE, LLC; MARTINEZ 1500 DUNDEE LLC; LAWRENCE MCCUNE; BARBARA MCCUNE; JAMES D. AND JUNE M. MERCER; MOCKINGBIRD RESOURCES LLC; 1500 WEST DUNDEE MORELAN, LLC; NELSON ROOFING 1500 DUNDEE, LLC; OAK PROPERTIES DUNDEE 53, LLC; RALPH C. OGDEN III; JONI F. OGDEN; ORTH 1500 DUNDEE, LLC; DONALD R. and CARLEE PETELLE; ROGER AND CAROL POIRIER; CW PURDOM 1500 DUNDEE, L.L.C.; PW PURDOM 1500 DUNDEE L.L.C.; GILBERT REESE; FREDERICK L. RICHARDS and JENNIFER GOODMAN, SFS, L.L.C.; SANTINI 1500 DUNDEE, L.L.C.; SUCHY 1500, LLC; TF REAL ESTATE 1500 LLC; WENTWORTH 1500 | Appeal from the Circuit Court of Cook County<br><br>Honorable Aaron Jaffe, Judge Presiding |

DUNDEE, LLC; and REDD RASMUSSEN 1500 LLC,

Plaintiffs-Appellees,

v.

JOHN TERZAKIS; ROXANNE GARDNER; and URBAN INVESTMENT TRUST, INC.,

Defendants-Appellants

(Rudy Mulder; Dundee 53, LLC; Master Dundee 53, LLC, a Delaware limited liability company; Manager Dundee 53, Inc., an Illinois corporation; CenterPoint Properties Trust; and Thomas P. Lowery and Associates, Ltd.,

Defendants).

JUSTICE McNULTY delivered the opinion of the court:

The trial court held appellants in contempt for disobeying an order for the corporate appellant to turn over certain funds to a receiver. The court later denied appellants' motion to purge the contempt. On appeal from denial of the motion to purge appellants seek review of the original turnover order and the contempt order, as well as the finding that they failed to purge the contempt.

We hold that we lack jurisdiction to review the merits of the turnover order and the contempt order. We find that the trial court had jurisdiction to order the corporation to turn over the funds, and it had jurisdiction to hold corporate officers in contempt for disobeying the order. However, the trial court lacked jurisdiction to hold in contempt an appellant who no longer served as an officer of the corporation at the time the court ordered the corporation

to turn over the funds at issue. The evidence at the purge hearing supported the court's finding that the corporate appellant and its officers failed to purge the contempt. Thus, we affirm the judgment in part and we vacate the judgment in part.

## BACKGROUND

Urban Investment Trust sought to purchase a commercial development called the Honeywell property. To facilitate the transaction it created a corporation it named Master Dundee 53 to serve as the property's master tenant. Tenants of the property paid rent and property taxes to the master tenant. The master tenant forwarded the sums it collected to Urban. Urban and the master tenant failed to pay the property taxes for 2000 and they allowed property insurance to lapse. In March 2002 the plaintiffs, tenants of the Honeywell property, sued Urban and the master tenant for mismanaging the property. The trial court appointed a receiver to manage the property during proceedings on the complaint. The court gave the receiver responsibility for collecting and paying taxes and purchasing insurance for the property.

In July 2002 the receiver moved for an order compelling Urban to turn over to the receiver more than $4 million Urban received in connection with the Honeywell property. At a hearing in July 2002, Roxanne Gardner testified that she had been president of Urban until November 2001, when she resigned. She admitted that CenterPoint Properties, a tenant at the Honeywell property, bought out its obligation under its lease for $2.5 million. CenterPoint paid $1.5 million directly to Urban, and the balance of more than $1 million cancelled a

promissory note reflecting a personal debt John Terzakis owed to CenterPoint.

Terzakis testified at a further hearing in August 2002 that only Gardner, Rudy Mulder and he, who served as Urban's officers, had authority to sign checks disbursing Urban's funds. The same three persons owned Master Dundee 53, and Master Dundee 53 had contractual responsibility for paying taxes on the Honeywell property. Terzakis admitted that when Urban received funds specifically from the Honeywell property, it put the funds into its own account, mixed with funds for operating many other properties.

A witness for plaintiffs testified that plaintiffs wired to Master Dundee 53 more than $700,000 for payment of property taxes from September 2000 through December 2001.

On December 12, 2002, the trial court ordered "Urban and its[] officers * * * to transfer * * * funds, in the amount of $3,336,423.01, to the Receiver." The court amended the December 12 order on January 3, 2003, to identify "John Terzakis, Rudy Mulder and Roxanne Gardner as the officers of Urban to whom the [turnover] Order applies." Urban filed a notice of appeal from the December 12 order, but this court, on Urban's motion, dismissed the appeal.

The receiver, on January 7, 2003, moved for a rule to show cause why Urban and its officers should not be held in contempt for violating the December 12 order. The trial court issued the rule on January 13, 2003, and set the matter for hearing on the allegations of contempt. Urban filed its answer to the rule on January 16, 2003, and presented Terzakis as its first witness on that date. Terzakis

testified that Urban had no money with which to pay the turnover amount.

On January 24, 2003, plaintiffs filed an amended complaint that added CenterPoint and others as new defendants. Terzakis and Gardner testified further in the contempt proceedings on January 29, 2003. The court continued the matter to permit Mulder to testify on March 5, 2003.

Before completion of the testimony in the contempt proceeding, CenterPoint and other parties filed motions for substitution of judge as of right.

The court completed the hearing on the rule to show cause in March, and on March 31, 2003, the court entered an order in which it held that it retained jurisdiction to complete the contempt hearing, despite CenterPoint's motion for substitution of judge. In the order the court said:

> "[T]he court finds Urban and its[] officers, Mr. Terzakis, Mr. Mulder and Ms. Gardner in contempt of court. Accordingly, upon the entry of this order the aforementioned individuals shall be fined in the amount of $2500 each per day until such time that they either comply with the turnover order and tender the funds to the Receiver or provide the court with a detailed financial history of the turnover funds, which the court accepts.
>
> * * *
>
> * * * The defendants are ordered to comply with this order immediately and the imposition of the $2500 fine shall begin to accrue as of April 8, 2003."

In the same order the court recounted Gardner's testimony that she "relinquished her position with Urban." The court commented that it "believe[d] that Ms. Gardner left because she felt Mr. Terzakis and Mr. Mulder were pushing her towards impending legal action, such as this matter." On April 8, 2003, the court amended the March 31 order to state explicitly its finding that "Roxanne Gardner was formerly a principal of Urban."

On April 7, 2003, Urban, Terzakis and Gardner filed a notice of appeal from the contempt order. Two weeks later the trial court granted their motion to dismiss voluntarily the notice of appeal. Terzakis moved to vacate the contempt order as void. Although the record on appeal does not include Gardner's motion to vacate the contempt order, the record does include her reply in support of her motion to vacate.

The trial court heard the two motions to vacate in May and on May 22, 2003, the court denied both motions. The court added:

> "[T]here will be an evidentiary hearing at 1:30 p.m. on May 29, 2003[,] on contemnors' oral Motion to Purge Contempt."

The record on appeal does not include a transcript of the May 22 proceedings, so we do not know the precise language of the oral motion to purge the contempt. No party appealed from denial of the motion to vacate the contempt order.

At the hearing on the motion to purge, Urban's accountant admitted that the master tenant had its own bank account, entirely separate from Urban's bank accounts. The money tenants paid for taxes went first to the

master tenant and then to Urban. Gardner testified that Urban put all such funds in its own accounts for "ease of accounting." She admitted that she could not tell from the books of account what happened to the money Urban received when CenterPoint bought out its obligations under its lease for part of the Honeywell property. She also could not tell what happened to the money Urban received from the master tenant when the tenants paid their property taxes.

Urban's accountant testified that during March 2001, the month Urban received $1.5 million from CenterPoint for the buyout of its lease, Urban received a total of more than $11 million from all its sources. Urban used the $1.5 million as part of its general accounts, and it paid it out as part of its expenditures for that month. The expenditures that month exceeded $11 million.

The accountant listed for the court all of the payees of the $11 million in expenses, although he did not often specify the amount of each payment. Urban paid Mulder more than $70,000 that month; the books of account did not explain the payment. The books showed several entries simply as "funding" for other entities Urban controlled, much the way it controlled the master tenant for the Honeywell property. Urban paid Terzakis $55,000, and it separately funded a number of "entit[ies] that Johnny [Terzakis] owned and/or managed." The accountant admitted for many payments he did not "know what that's actually for." Urban paid $208,000 to Illinois Petroleum, "a company that Johnny owns." The accountant could not determine the purpose of the payment to Illinois Petroleum. Urban used some of the funds for mortgage payments for other properties it owned, and it made some political contributions.

Due to scheduling difficulties the hearing on the motion to purge extended over six hearing dates from May 2003 to September 2003. On November 26, 2003, the court entered its order finding that Urban, Terzakis and Gardner failed to purge the contempt. Because Mulder filed a bankruptcy petition, the court reserved all issues related to him, pending resolution of the bankruptcy proceedings. The court summarized the testimony and addressed the motion:

> "So we now must ask the questions. Was the order of contempt purged? Did the contem[n]ors turn over, to the receiver the funds that Urban was given which proceeds were to be used for taxes, mortgage payments and expenses of the Honeywell property? Was the Court shown that the funds were used for purposes intended under the * * * cont[r]acts? Was the court told why Urban had control of the Honeywell funds? The answer to all of the above questions is a resounding 'No.'
>
> * * * What is given the court is the answer that they do not have the ability to pay what the court ordered them to turn[ ]over.
>
> That does not purge the contempt. What it does is concede and admit to the court that they misappropriated millions of dollars for their own purposes. They admit that they violated their fiduciary obligations to the Honeywell tenants in common and appropriated funds for uses of their own. John Terzakis, Rudy Mulder and Roxanne Gardner commingled assets of different entities that they owned and controlled. Corporate identities meant nothing to them.

* * * [T]he parties concede that they misappropriated funds and used them for their own purpose. They do not explain what the money was used for. They treat it as their own.

* * * All that is shown is that Urban was depleted for their own benefit. While they are so acting the Honeywell property was put on the brink of being lost. Mortgages and taxes were not paid and the plaintiffs were and are in serious danger of losing their property. * * *

Therefore the court finds that the contempt has not been purged by any party * * * .

* * *

* * * As to John Terzakis the Court finds that the contempt order is not purged. Further, the court finds the contempt to be willful and malicious. * * * Instead of coming forth and being honest with the court, Terzakis sends forth his underlings in an attempt to mislead the court.

* * * It is hereby Ordered * * * that judgment be entered against John Terzakis in favor of the plaintiffs and receiver in the amount of $572,500.00 for 229 days pursuant to the contempt of court order, which represents the amount of the daily assessments times the number of days that order has presently been pending and is in default.

* * *

* * * As to Roxanne Gardner, the court finds that the contempt order is not purged. * * * She knowingly fronts for John Terzakis and Rudy Mulder. It is further ordered * * * that judgment is entered against Roxanne Gardner for $572,500.00 for 229 days pursuant to the contempt order."

Urban, Terzakis and Gardner filed a notice of appeal on December 15, 2003. They sought review of the original turnover order dated December 12, 2002, the order dated January 3, 2003, that identified Terzakis, Mulder and Gardner as Urban's officers, the January 13 order for a rule to show cause, the contempt order dated March 31, 2003, the denial of the motions to vacate the contempt by order dated May 22, 2003, and the order of November 26, 2003, in which the court found that Urban, Terzakis and Gardner failed to purge the contempt.

Plaintiffs filed a motion to dismiss the appeal as untimely insofar as appellants attempted to challenge any order other than the order dated November 26, 2003. This court denied the motion to dismiss the appeal. The parties briefed issues concerning all of the orders listed in the notice of appeal.

Urban moved to strike from plaintiffs' brief the statement of facts. We took the motion with the case.

## ANALYSIS

### Motion to Strike

We first address the motion to strike the statement of facts from plaintiffs' brief. We agree with appellants that plaintiffs' brief includes many purported statements of fact without proper supporting citations to the record. See 188 Ill.2d R. 341(e)(6). Plaintiffs cite to their own complaints as support for many statements of fact regarding the transactions between plaintiffs, the master tenant, and Urban. Allegations in a complaint do not qualify as evidence of the facts alleged. See *Gabriel v. Columbia National Bank of Chicago*, 228 Ill.App.3d 240, 247 (1992).

However, this court will not strike a party's statement of facts unless it includes such flagrant improprieties that it hinders our review of the issues. *Lock 26 Constructors v. Industrial Comm'n*, 243 Ill.App.3d 882, 886 (1993). We find that the improprieties here do not significantly hinder our review. Thus, we will not strike plaintiffs' statement of facts, but we will disregard any inappropriate or unsupported statements. See *Lock 26 Constructors*, 243 Ill.App.3d at 886.

Appellate Jurisdiction

Although this court has denied plaintiffs' motion to dismiss parts of the appeal, "the denial of a motion to dismiss an appeal prior to briefing and argument is not final and may be revised at any time before the disposition of the appeal. [Citations.] This court has an obligation to consider its jurisdiction at any time and should dismiss an appeal if jurisdiction is lacking." *Hwang v. Tyler*, 253 Ill.App.3d 43, 45 (1993).

Urban argues that the original turnover order dated December 12, 2002, has the effect of a mandatory preliminary injunction. See *Electronic Design & Manufacturing, Inc. v. Konopka*, 272 Ill.App.3d 410, 415 (1995). Urban filed a timely notice of appeal from the turnover order, but this court later granted Urban's motion to dismiss the appeal.

In *Battaglia v. Battaglia*, 231 Ill.App.3d 607 (1992), the trial court similarly entered a preliminary injunction and the defendant filed a timely notice of appeal. The appellate court dismissed the appeal when the defendant chose not to pursue it. The defendant later moved the trial court for dissolution of the injunction. When the court

denied the motion, the defendant filed a new notice of appeal. On appeal he argued that the trial court erred when it entered the preliminary injunction. *Battaglia*, 231 Ill.App.3d at 614. The appellate court held that it lacked jurisdiction to consider the argument. *Battaglia*, 231 Ill.App.3d at 616. The court said:

> "[A]lthough he had the opportunity to appeal the circuit court's grant of the preliminary injunction, [the defendant] neglected to perfect that appeal. Accordingly, he cannot now assert those issues and arguments which he failed to pursue in his first appeal. Rather, he is confined to whatever issues were presented to the circuit court in his motion to dissolve the preliminary injunction." *Battaglia*, 231 Ill.App.3d at 615-16.

See also *Busey Bank v. Salyards*, 304 Ill.App.3d 214, 218 (1999) (on review of judgment holding defendants in contempt for failure to turn over funds, failure to appeal turnover order left appellate court without jurisdiction to review merits of turnover order).

Urban, Terzakis and Gardner counter that this court has jurisdiction to review the turnover order as a procedural step leading to the appealable order finding that they failed to purge the contempt. In *Maggio v. Zeitz*, 333 U.S. 56, 92 L. Ed. 476, 68 S. Ct. 401 (1948), the Court similarly faced an appeal from a final order in a contempt proceedings where the trial court found that the appellants failed to comply with a turnover order. The Court said:

> "The question now arises as to whether, in this contempt proceeding, the Court may inquire into the justification for the turnover order itself. It is clear however that the turnover proceeding

> is a separate one and, when completed and terminated in a final order, it becomes *res judicata* * * *.
>
> * * * The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be taken that orders issue, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place." *Maggio*, 333 U.S. at 68-69, 92 L. Ed.2d at 486-87, 68 S. Ct. at 407-08.

See also *In re Amdur*, 137 F.2d 708, 710 (3d Cir. 1943) (turnover order is *res judicata* in subsequent contempt proceeding based on violation of turnover order).

We find the reasoning of *Maggio* applicable here. Under that reasoning, and following *Battaglia*, we find that we lack jurisdiction to review the original turnover order on its merits because defendants failed to pursue a timely appeal from that order.

Urban, Terzakis and Gardner also failed to pursue timely appeals from the order of January 3, 2003, which modified the turnover order. We lack jurisdiction to consider the merits of that order.

Next, Urban, Terzakis and Gardner challenge the rule to show cause entered on January 13, 2003, and the subsequent order of March 31, 2003, finding them in contempt of court. The March 31 order imposed fines and provided that Urban and its officers could purge the

contempt by complying with the turnover order or by supplying a detailed financial history of the turnover funds. Again, appellants filed a timely notice of appeal from the contempt order, but they voluntarily dismissed the appeal. Instead they pursued timely postjudgment motions to vacate the contempt order. But following denial of the motions to vacate on May 22, 2003, they filed no timely notice of appeal.

Appellants argue that their oral motion to purge the contempt, presented in court on May 22, 2003, extends the time for appeal from the contempt judgment. We disagree. To extend the time for appeal, a party must file a post-judgment motion "directed against the judgment." 155 Ill.2d R. 303(a). Appellants' motions to vacate the judgment qualified as postjudgment motions directed against the judgment, but they filed no appeal from denial of those motions. In hearings on the subsequent motion to purge, they attempted to prove that they complied with the court's order. A motion in which the party claims that it has abided by the judgment is not a motion directed against the judgment. *Lewis v. Loyola University*, 149 Ill.App.3d 88, 92 (1986). The oral motion to purge the contempt did not extend the time for appealing from the contempt judgment.

"[A]n order finding a person in contempt and imposing a monetary or other penalty is immediately appealable. * * * Contempt citations * * * must be appealed within 30 days of their entry or be barred." *Revolution Portfolio, LLC v. Beale*, 341 Ill.App.3d 1021, 1025 (2003). The failure to file a timely appeal from the contempt order imposing sanctions deprives this court of jurisdiction to review the merits of the contempt order of March 31, 2003, the denial of the motion to vacate the contempt, dated May 22, 2003,

and the initial rule to show cause entered January 13, 2003. See *Longo v. Globe Auto Recycling, Inc.*, 318 Ill.App.3d 1028, 1036 (2001); *Davis v. Bughdadi*, 120 Ill.App.3d 236, 240 (1983).

Appellants filed a notice of appeal within 30 days of the order in which the court found that appellants failed to purge the contempt. Nothing remains for the trial court to do concerning the contempt against appellants except to enforce its judgment. Therefore the order qualifies as a final judgment concluding the separate contempt proceedings against these parties, and we have jurisdiction to review that judgment. See *People ex rel. Scott v. Silverstein*, 87 Ill.2d 167, 172 (1981); *United States v. Brumfield*, 188 F.3d 303, 306-07 (5th Cir. 1999).

Although we lack jurisdiction over the attempted direct appeals from the turnover order and the contempt order, the timely appeal from denial of the motion to purge gives us authority to consider some of appellants' arguments concerning the prior orders. In this respect the case bears similarity to *In re Estate of Pinckard*, 94 Ill.App.3d 34 (1981). In that case the trial court ordered several lawyers to turn over certain funds to an estate, and the lawyers filed a notice of appeal from the turnover orders, but they abandoned it. The court later held the attorneys in contempt for failing to turn over the funds. On appeal from the contempt order the court said that the turnover orders, "being final orders, cannot now be attacked as being improper or wrong in substance but can only be attacked on limited grounds such as the trial court's lack of jurisdiction to enter them." *Pinckard*, 94 Ill.App.3d at 44. Accordingly, on this appeal we have authority to address appellants' arguments that the trial court lacked jurisdiction to enter the orders of December 12, 2002,

January 3, 2003, January 13, 2003, March 31, 2003, and May 22, 2003.

Trial Court Jurisdiction

A trial court has jurisdiction to decide any case over which it has subject matter jurisdiction, as long as it obtains personal jurisdiction over the parties. *Steinbrecher v. Steinbrecher*, 197 Ill.2d 514, 530-31 (2001). The parties here do not contest the trial court's jurisdiction over the subject matter of the case. Urban admits that the trial court obtained personal jurisdiction over it prior to December 2002. Therefore, the trial court had jurisdiction to order Urban to turn over to the receiver the funds it received in connection with the Honeywell property.

"It is well settled that corporate officers are obligated to obey judicial orders directed at their corporations." *City of Chicago v. Air Auto Leasing Co.*, 297 Ill.App.3d 873, 879 (1998). In the order dated December 12, 2002, the trial court directed "Urban and its[] officers" to turn over certain funds. The trial court had jurisdiction to enter the turnover order of December 12, 2002.

Gardner and Terzakis claim that the court lacked jurisdiction to enter the order dated January 3, 2003, identifying them as officers of Urban, because the court had not obtained jurisdiction over them as individuals. However, the court had jurisdiction to enter orders against Urban, and thereby to obligate Urban's officers to comply with the orders. The identification of the officers so bound did not exceed the court's jurisdiction. The court's inherent authority to enforce its orders gave it jurisdiction to enter the rule to show cause, again directed against Urban and

its officers. See *Sanders v. Shephard*, 163 Ill.2d 534, 540 (1994).

Appellants claim that the trial court lacked jurisdiction to enter the contempt order dated March 31, 2003, because CenterPoint and others, in February 2003, filed motions for substitution of judge as of right. In general, the court must grant any timely filed petition for substitution of judge as of right, and the court lacks authority to enter any other order in the proceeding in which the party presented the petition. *In re Dominique F.*, 145 Ill.2d 311, 324 (1991).

CenterPoint presented its petition for substitution of judge only in the underlying proceedings here, and not in the independent, collateral contempt proceedings. See *In re Marriage of Alush*, 172 Ill.App.3d 646, 650 (1988). None of the orders listed in the notice of appeal apply to CenterPoint or any other party who filed a motion for substitution of judge as of right. Moreover, CenterPoint filed its motion for substitution of judge after the court had begun evidentiary hearings on the rule to show cause. Usually, the trial court should hear and dispose of motions in the order in which the parties filed them. *Dominique F.*, 145 Ill.2d at 324. We find that CenterPoint's motion for substitution of judge did not deprive the trial court of jurisdiction to complete the proceedings it had already commenced against other parties on the contempt allegations.

Next, appellants argue that the contempt order is void because it is too vague and it lacks a sufficient statement of supporting facts. Appellants cite no authority for the proposition that such defects make the order void. By failing to cite authority appellants waived the issue. See

*Charter Bank v. Eckert*, 223 Ill.App.3d 918, 929 (1992). Moreover, the court order includes extensive findings of fact, and we see nothing vague about the order directing Urban's officers to pay $2,500 a day until they purge themselves of contempt, either by transferring from Urban to the receiver $3,336,423.01, or by providing a detailed history of the funds Urban received for the Honeywell property. See *Doe v. Lutz*, 253 Ill.App.3d 59, 65-66 (1993).

Appellants contend that the use of the phrase "that the court accepts" in the contempt order renders the order too vague for enforcement. We disagree. With virtually all court orders, the court retains jurisdiction to determine whether the parties have complied. *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill.2d 291, 297-98 (2000). A party's purported compliance with any order will not discharge its responsibility unless the court finds the compliance acceptable. For example, in *Armstrong v. Guccione*, 351 F.Supp.2d 167 (S.D.N.Y. 2004), the court ordered Armstrong, a corporate officer, to turn over certain corporate assets in his possession. Armstrong turned over some of the assets and testified that he gave others as gifts and transferred some to business associates. *Armstrong*, 351 F.Supp.2d at 170. The court found Armstrong's explanation inadequate. *Armstrong*, 351 F.Supp.2d at 170. Acceptability to the court of the contemnor's performance of purging conditions is an implicit component of any contempt order. The inclusion of superfluous surplusage in the trial court's order here did not make it vague, and it did not invalidate the order. *Godfrey v. Brown*, 81 Ill.App.2d 453, 455 (1967).

Terzakis argues that the court lacked jurisdiction to hold him in contempt for Urban's violation of the December 2002 order.

> "'A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt.'" *People v. Rezek*, 410 Ill. 618, 628 (1951), quoting *Wilson v. United States*, 221 U.S. 361, 55 L. Ed. 771, 31 S. Ct. 538, 543 (1911).

Thus, the court had jurisdiction to hold Urban's officers, including Terzakis, in contempt for violation of the turnover order.

Gardner separately challenges the court's jurisdiction to enter the contempt order against her. In that order the court recounted Gardner's testimony that she relinquished her position as an officer of Urban, and the court found that "Gardner left" Urban. The court later amended the contempt order to state explicitly that "Gardner was formerly a principal of Urban." The court had jurisdiction over Urban at the time it entered the turnover order dated December 12, 2002, but this jurisdiction extended only to Urban and its officers. The court's jurisdiction did not extend to former officers who lacked authority to act on behalf of Urban at the time the court entered the turnover order. Cf. *Rezek*, 410 Ill. at 628-29.

Plaintiffs point to evidence in the record that Gardner remained an officer of Urban throughout the proceedings, as she admitted her continuing close ties to Terzakis and his corporations. While we agree that the record includes such evidence, the trial court unequivocally accepted contrary evidence that Gardner had resigned from Urban

as of November 2001. On this record, with contradictory evidence, we will not disturb the trial court's finding of fact that Gardner had resigned before the court entered its first order in this case. Because the contempt order on its face compelled Gardner to act on behalf of a corporation for which she no longer served as an officer, we find the contempt order void as applied to Gardner. See *JoJan Corp. v. Brent*, 307 Ill.App.3d 496, 507 (1999). Accordingly, we vacate the sanctions imposed against Gardner.

Purge Order

At last we reach the only issue before us for direct review. Terzakis and Urban filed a timely appeal from the trial court's judgment entered on its finding that Terzakis and Urban failed to purge themselves of contempt. We review the decision on a motion to purge for abuse of discretion. *In re Marriage of Wassom*, 165 Ill.App.3d 1076, 1079 (1988).

Terzakis and Urban presented evidence that after they received more than $700,000 for payment of property taxes and $1.5 million from a lease buyout, and after cancellation of Terzakis's personal debt of more than $1 million to CenterPoint, all in connection with the Honeywell property, Urban and Terzakis failed to pay the property taxes and they allowed insurance to lapse. During the month in which Urban received the $1.5 million, it received in excess of $11 million in income and it spent more than $11 million. Many of its payments went to various other projects Terzakis sought to pursue. The Urban accountant who testified could not tell the purpose of the expenditures, except that they "fund[ed]" Terzakis's preferred projects. The court asked what Urban and

Terzakis did with money they received from the Honeywell tenants, especially funds for taxes. Terzakis and Urban answered, in effect, that they hid it under other shells Terzakis operated. On this evidence we cannot say that the trial court abused its discretion by holding that Terzakis and Urban failed to purge themselves of contempt. See *Armstrong*, 351 F.Supp.2d at 170.

Finally, Terzakis contends that the trial court abused its discretion by imposing a fine of $2,500 per day for 229 days because the trial court delayed proceedings on the motion to purge. Terzakis cites no authority in support of the argument. Accordingly, we find the argument waived. See *In re Marriage of Hunter*, 223 Ill.App.3d 947, 955 (1992).

The trial court had jurisdiction to enter the order directing Urban and its officers to turn over to the receiver funds Urban received for the Honeywell property. The court also had jurisdiction to hold Urban and its officers in contempt for failing to obey the turnover order. Because the court, in the contempt order as amended, expressly found that Gardner no longer served as an officer of Urban, the order shows that the court lacked jurisdiction to hold her in contempt for Urban's failure to comply with the turnover order. We lack jurisdiction to review the turnover order and the contempt order on their merits because Urban and Terzakis failed to pursue appeals from those orders. We review on the merits only the order in which the court held that Urban and Terzakis failed to purge themselves of contempt. The trial court did not abuse its discretion in holding that they failed to purge the contempt. Therefore, we affirm the judgment against Terzakis and Urban, and we vacate the judgment against Gardner.

Affirmed in part and vacated in part.

FITZGERALD-SMITH and O'MALLEY, JJ., concur.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING:

JUSTICE McNULTY delivered the supplemental opinion of the court:

Urban and Terzakis raise several issues, including a new challenge to the trial court's jurisdiction, on petition for rehearing. First, they seek to appeal from an order dated December 19, 2002, that identified Terzakis and Mulder as the officers of Urban to whom the order dated December 12, 2002, applied. We did not discuss this order previously because Urban and Terzakis did not list the order in their notice of appeal. We see no need to review the order now, because the trial court on January 3, 2003, entered an order that superceded the December 19 order. The order of January 3, 2003, discussed in our original opinion, identified Terzakis, Mulder and Gardner as the officers of Urban ordered to comply with the December 12 order. Because the December 19 order had no effect on the disposition of the contempt charge, we will not review that order. See *Simmons v. Garces*, 198 Ill.2d 541, 566-67 (2002).

Urban and Terzakis also contend that we should have considered the merits of the argument that the trial court abused its discretion by fining them for the 229 days the court took to complete the hearing on the petition to purge the contempt. We declined to review the issue because Urban and Terzakis failed to cite any pertinent authority. On petition for rehearing they cite *Marsh v. Lake Forest*

*Hospital*, 166 Ill.App.3d 70, 74-75 (1988), as authority for the proposition that they need not cite legal authority in support of some arguments.

In *Marsh* the appellant cited a statute, but no case law, for one argument. The appellee moved to strike that portion of the appellant's brief for failure to cite pertinent authority. The court noted that the statute itself constituted pertinent authority. *Marsh*, 166 Ill.App.3d at 75. Because no court had previously interpreted the statute, the court held that the failure to cite case law did not waive the issue. The court in *Marsh* did not disturb consistent authority holding that the failure to cite any pertinent authority in support of an argument forfeits review of the issue. See *Eisenberg v. Industrial Comm'n*, 337 Ill.App.3d 373, 383 (2003).

Next, Urban and Terzakis claim that they challenged the trial court's subject matter jurisdiction in their original briefs on appeal. They refer us to pages on which they argued that the use of the phrase "which the court accepts" in the contempt order rendered the order too vague for enforcement. The original briefs do not mention, let alone attack, the trial court's subject matter jurisdiction.

Nonetheless, we still have an obligation to vacate any order the trial court entered without subject matter jurisdiction. Accordingly, we will now address the new challenge to that jurisdiction. Urban and Terzakis claim that Urban never had a *res* subject to the turnover order, and therefore the court lacked jurisdiction to order them to enter the turnover order. They cite *Maggio*, 333 U.S. 56, 92 L. Ed. 476, 68 S. Ct. 401, as authority.

In *Maggio* the trial court ordered the bankrupt petitioner to turn over certain merchandise, and the court held

him in contempt when he failed to deliver the specified merchandise. The appellate court affirmed the contempt finding, although the court apparently believed the petitioner no longer possessed the merchandise at issue. On a further appeal, the Supreme Court held that the trial and appellate courts misapplied the presumption that possession by a party at a given time proves continued possession until the party explains how he lost possession. The Court emphasized that evidence may rebut the presumption and the courts have a duty not to enforce a turnover order when the evidence shows the person so ordered cannot comply. *Maggio*, 333 U.S. at 65-67, 92 L. Ed. at 484-86, 68 S. Ct. at 406-07. The Court reiterated the general rule that "it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession." *Maggio*, 333 U.S. at 65-66, 92 L. Ed. at 485, 68 S. Ct. at 406. The Court remanded the case for the trial court to consider all of the evidence to determine whether to use its contempt power to enforce the turnover order.

Notably, the Supreme Court did not say that proof of lack of possession would leave the trial court without jurisdiction to enter the contempt. Thus, *Maggio* does not support the jurisdictional argument Urban and Terzakis make here.

Moreover, the trial court here properly applied the permissible presumption of continuing possession. The trial court heard evidence that Urban received funds for operation of the Honeywell property, and Urban transferred its funds to Terzakis and to various entities Urban and Terzakis controlled. Urban and Terzakis presented no evidence of the purpose of the transfers, as their witness candidly admitted he did not know those purposes. As the

court found, "All that is shown is that Urban was depleted for [Terzakis's] own benefit." In this case, as in *Armstrong*, the evidence sufficed to show that the corporate officer retained control over the funds, and the court had the authority to use its contempt powers to enforce its turnover order.

Finally, Urban and Terzakis protest our decision to resolve this case without oral argument. We lack jurisdiction to consider almost all of the substantive arguments the parties raised on this appeal. We believe that appellate attorneys and this court should devote scarce time to substantial matters this court has jurisdiction to decide. Accordingly, we deny the petition for rehearing.

FITZGERALD-SMITH and O'MALLEY, JJ., concur.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| ANDERSON DUNDEE 53 L.L.C., et al. Plaintiffs-Appellees, v. JOHN TERZAKIS, et al., Defendants-Appellants. | ) ) ) ) ) ) ) ) | No. 1-03-3708 |

**ORDER**

(Filed Dec. 2, 2005)

Upon consideration of the petition for rehearing of defendants-appellants,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED. A supplemental opinion on denial of rehearing will be filed forthwith.

/s/ Jill K. McNulty
Presiding Justice
Jill K. McNulty

/s/ James F. Smith
Justice James Fitzgerald Smith

/s/ Denise M. O'Malley
Justice Denise O'Malley

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION**

| | | |
|---|---|---|
| Anderson Dundee 53, L.L.C. Et, al<br>Plaintiff<br>v<br>Dundee, Inc. and Illinois Corporation Master Dundee 53, LLC, a Delaware Limited liability company and Urban Property Services, Corp.<br>Defendants. | ) | 02 CH 0086 |

**ORDER**

(Entered Nov. 26, 2003)

This matter comes forth on contemptor's Urban Investment Trust, John Terzakis, Rudy Miller [sic] and Roxanne Gardner's motion to purge the contempt order that was entered against them on April 18, 2003.

John Terzakis, Rudy Muller [sic] and Roxanne Gardner were at the time of the transactions involved in the contempt hearing, the sole shareholders and officers of Master Dundee 53 Inc. They were also at the same time the sole shareholders and officers of Urban Investments Trust.

Master Dundee 53 and Centerpoint Property Trust (Centerpoint) entered into a contract dealing with the management of the property which is the subject matter of this case. Urban Investment Trust had no interest and was in no way part of the transaction between Master Dundee 53 and Centerpoint.

The funds that Manager Dundee 53 received from Centerpoint for termination were $747,681.34 specifically allocated for payment of taxes and $2,588,741.67 paid by Centerpoint Properties Trust as consideration for the termination on a portion of the property in question 1400-1500 Dundee Road, Arlington Heights, Illinois referred to as the Honeywell property. Thus $3,336,423.01 was the total amount deposited. Funds received by Manager Dundee LLC were to be used for the Honeywell property.

Because taxes were in default, the mortgage on the Honeywell was in serious default and other matter were awry at the Honeywell property, at the time of the filing of this suit, Bruce Heller was appointed Receiver to manage the Honeywell properties and stepped into the shoes of Master Dundee. The Court was further told that Urban is now out of business – that its' funds were depleted.

The receiver discovered that the funds received by Master from Centerpoint were given to Urban Investment Trust who had no interest and no connection with the Honeywell property. Urban and Urban's officers John Terzakis, Rudy Mulder, and Roxanne Gardner had been given $3,336,423.01 in funds and notes which belonged to the plaintiffs and tenants in common, which funds were specifically designated for the payment of real estate taxes and other expenses of the property in issue. Specifically, those funds include $747,681.34 that Master allegedly received for payment of taxes, a $1,500,000.00 lease termination payment, and a $1,088,741.67 payment used to reduce the balance on a note held against the Honeywell property. In addition other funds from the Honeywell accounts went to Urban. The mortgage was in arrears, real estate taxes were in arrears, and a tax sale and foreclosure was imminent. Considering those funds to be

in a constructive trust for the property, the Court ordered a turnover of those funds from Urban and its officers to the receiver for the payment of bills and expenses of the property. The Court held numerous hearings in attempting to collect the funds. Because the Contemptors refused to turn over these funds, Urban and its officers, John Terzakis, Rudy Mulder and Roxanne Gardner were held in contempt. It is an uncontroverted fact that Urban and its officers received those funds. Yet in prior hearings, John Terzakis, Rudy Mulder and Roxanne Gardner came forth and denied knowledge of where the funds were placed, who was responsible for the transfer of funds, or whether the funds were rightfully expended for property business. The contempt order told the parties to produce the funds and give them to the receiver or to come clean and tell the Court where those assets were so that the receiver could collect same.

At first the contemptors indicated to the Court that the contempt order was to be appealed. Later, the contemptors informed the parties and the Court that they were not going to go through with the appeal but rather would purge the contempt. The court heard the contemptors motion to purge over a period of time. Dates had to be staggered because of scheduling conflict of the parties as well as the Court.

The witnesses presented by the contemptor were Roxanne Gardner and two minor accountants that had worked for Urban Investments Trust.

Ms. Gardner essentially testified that she was no longer associated with Urban although she was president of Urban at the time of the Master Dundee-Counterpoint transaction. Again, she testified that she was a mere

figurehead, that she knew nothing about the funds. She didn't know where they went, what the money was used for and why it was in the Urban Account and who directed funds to go there. She was the president of the company and her signature appears on document after document. She still works for John Terzakis in the real estate business probably doing the same things she did for Urban.

John Terzakis and Rudy Mulder did not appear for any part of the hearing nor did they testify. John Terzakis had a lawyer present; Roxanne Gardner has a lawyer present. The Court was informed that Mulder had a lawyer but that lawyer did not appear. Since the time of the hearing the receiver filed his report notifying the court of the fact that Rudy Mulder filed bankruptcy petitions.

Urban was represented by counsel who did all the direct examination for all attempting to purge the contempt.

What was presented was essentially was some of Urban's book of accounts showing that indeed the Honeywell money wound up in the Urban account. Not only was the money of the plaintiff in the Urban account, that account also collected and distributed moneys for approximately 30 to 40 different projects and entities that were commingled. Many projects were identified as John Terzakis's projects.

Presented to the court to explain the entries into the books were two accountants. These were lower level accountants who had no knowledge relative to why monies went into this account. They did nothing to enlighten the court as to where the Honeywell money wound up or if indeed it was spent for the Honeywell property. As an example, funds flowed to money accounts that were

identified as John Terzakis account or projects. When asked why the money was going there, the explanation was the Urban owed Terzakis money. It appears that it made no difference where the money came from, it was right to put it into a John Terzakis account because Urban owed John Terzakis money. Neither the accountants nor the attorney doing the direct examination understood that it was wrong for the money coming from the Honeywell property to be placed or given to Urban. Everything was lumped together and used for Urban purposes, and whatever the principals desired.

And who had knowledge of why the funds were being recorded and used in that manner? The two accountants certainly did not. Roxanne Gardner who was the president of Urban during the time much of the actions did not.

It was suggested that perhaps the head accountant knew. He was identified by name but surprisingly no one knew where he was. Did Terzakis or Mulder come in to testify at their purge hearing? No. Where were John Terzakis and Mulder? They were someplace in the Chicago area, but they were not in the Court. Rudy Mulder is now in Bankruptcy. John Terzakis is still in business. Roxanne Gardner and Antoine Johnson the accountant who was to explain the accounts are still associated with John Terzakis.

When Johnson was asked by the court what responsibility did Terzakis, Rudy Mulder and Roxanne Gardner have with regard to the accounting he replied, transcript page 70, "None that I know of. That was left to Peter Mori. He was the controller. . . ." Then asked if the controller could make those decision to do as he wished with the fund, he said he didn't believe so. In order to get the

answers to the questions the court posed, Johnson said the proper parties for anyone to speak to were the controller, Mori or one of the more of three principals.

So we now must ask the questions. Was the order of contempt purged? Did the contemptors turn over, to the receiver the funds that Urban was given which proceeds were to be used for taxes, mortgage payments and expenses of the Honeywell property? Was the court shown that the funds were used for purposes intended under the Dundee contacts? Was the court told why Urban had control of the Honeywell funds? The answer to all of the above questions is a resounding "No."

Instead the Urban attorney and his client(s) want the court to handle this matter in like manner as a domestic non-support order where a party is ordered to pay support but has no funds to do so. In doing so the attorney for Urban and the principals intend to stand this courts order on its head. What is given the court is the answer that they do not have the ability to pay what the court ordered them to turnover.

That does not purge the contempt. What it does is concede and admit to the court that they misappropriated millions of dollars for their own purposes. They admit that they violated their fiduciary obligations to the Honeywell tenants in common and appropriated funds for uses of their own. John Terzakis, Rudy Mulder and Roxanne Gardner commingled assets of different entities that they owned and controlled. Corporate identities meant nothing to them.

In a domestic relations support case if a person has no money to pay the support owed the court will not impose penalties. That is not the case here. Here, the parties

concede that they misappropriated funds and used them for their own purpose. They do not explain what the money was used for. They treat it as their own.

In this case they do not even meet the elements of a domestic relations case, which this case is not. They have not shown lack of funds. All that is shown is that Urban was depleted for their own benefit. While they are so acting the Honeywell property was put on the brink of being lost. Mortgages and taxes were not paid and the plaintiffs were and are in serious danger of losing their property. The contemptors have acted in a malicious and willfully contemptuous manner.

Therefore the court finds that the contempt has not been purged by any party and hereby orders, adjudges and decrees as follows:

1. As to Rudy Mulder the court finds that since he now is in bankruptcy, the Court will reserve all matters pursuant to Rudy Mulder until the bankruptcy is completed. The receiver is directed to track the bankruptcy and to report to this court how the statements in the bankrupts interface with statements in this case and to do all other things to protect the Honeywell funds.

2. As to John Terzakis the Court finds that the contempt order is not purged. Further, the court finds the contempt to be willful and malicious. The court finds that all the keys that will solve the mysteries of this case lay in Terzakis pocket. Instead of coming forth and being honest with the court, Terzakis sends forth his underlings in an attempt to mislead the court.

3. It is hereby Ordered, Adjudged and Decreed that judgment be entered against John Terzakis in favor of the plaintiffs and receiver in the amount of $572,500.00 for 229 days pursuant to the contempt of court order, which represents the amount of the daily assessments times the number of days that order has presently been pending and is in default.

   The judgment is entered with malice.

   The receiver is to take necessary steps to collect this judgment. Once collected the receiver will deposit same in an insured interest bearing account and be subject to court order.

4. As to Roxanne Gardner, the court finds that the contempt order is not purged. The Court finds her act of testifying that she knows nothing is disingenuous. She knowingly fronts for John Terzakis and Rudy Mulder. It is further ordered, adjudged and decreed that judgment is entered against Roxanne Gardner for $572,500.00 for 229 days pursuant to the contempt order.

Court further orders that the previous contempt order stay in effect and that the fines levied in that order shall continue on until the parties comply with the turnover order and tender the funds referred to in the order of March 31, 2003 to the receiver. The Court further orders that all other matter previously stayed will remain stayed until the contempt order is complied with.

/s/ Judge Aaron Jaffe-190

ORDERED: JUDGE AARON JAFFE

**IN THE CIRCUIT COURT OF
COOK COUNTY ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

| | | |
|---|---|---|
| ANDERSON DUNDEE 53 L.L.C., et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | 02 CH 0086 |
| MANAGER DUNDEE 53, INC., et al., | ) | |
| Defendants. | ) | |

**ORDER**

(Entered Mar. 31, 2003)

This matter is before the court for ruling following a hearing on the Receiver Mr. Bruce Heller's (the "Receiver") motion for rule to show cause entered by this court January 13, 2003. The court is fully advised in the premises having heard witnesses' testimony and received documents into evidence.

On December 12, 2002, a motion for turnover offends was entered against the Defendant URBAN INVESTMENT TRUST ("Urban"). The order compelled Urban to turn over funds received by MASTER DUNDEE 53, LLC ("Master") for the benefit of the Honeywell property, and allegedly transferred to Urban at the direction of Mr. John Terzakis and Mr. Rudy Mulder, Urban's principals. The order directed the transfer of funds, in the amount of $3,336,423.01, to the Receiver. Specifically, those funds include $747,681.34 that Master allegedly received precisely for payment of taxes, a $1,500,000 lease termination payment, and a $1,088,741.67 payment used to reduce the balance on a note held against the Honeywell property. Mr.

Terzakis, Mr. Mulder, and Ms. Roxanne Gardner are the sole principals, not only of Urban, but also of Master. Master was the entity owning the lease and the entity managing the property. Urban was not a party to the transaction concerning the Honeywell property. Nonetheless, the money went into an Urban account, which was totally under the control of Mr. Terzakis and Mr. Mulder. A million and half dollars (1,500,000) of that money went toward forgiving a loan made by Mr. Terzakis and Mr. Mulder, who certainly were not individual parties to the transaction.

It would appear that Mr. Terzakis and Mr. Mulder were using the entities for their own purposes and not for the purposes that benefit individuals and entities to which they owed a fiduciary duty. This certainly appears to be a case where the corporate veil should be pierced. In addition, Ms. Gardner testified that she relinquished her position with Urban and other entities controlled by Mr. Terzakis and Mr. Mulder because she had no say in the operations – that she was used merely as a figurehead, despite holding the title of president of Urban. The court believes that Ms. Gardner left because she felt Mr. Terzakis and Mr. Mulder were pushing her towards impending legal action, such as this matter.

Currently, the people who depended on the Terzakis, Mulder and Gardner run entities are losing millions of dollars. Master and the other defendants collected monies for specific purposes – for payment of real estate taxes, for mortgage payments and for receipt of a lease termination payment. Those fields were for specific purposes. These funds were to placed in segregated accounts for those purposes. The Defendants had a fiduciary duty to do so. They did not fulfill that fiduciary duty. And, now what do

Mr. Terzakis, Mr. Mulder and Ms. Gardner have to say? Nothing. All they can muster is we do not have the money and we do not [sic] where it went. Even though it was wrongfully deposited in the accounts that they totally controlled. Nonetheless, these defendants have failed to turnover the funds. As a result, on January 13, 2003, the court entered a rule to show cause as to why the defendants should not be held in contempt of court and set the matter for hearing.

At the hearing, the Receiver argued that Urban and it's past and present officers, Mr. Terzakis, Mr. Mulder and Ms. Gardner, have failed to comply with any part of the turnover order. In addition, the Receiver maintained that Urban and its' officers failed to demonstrate that they were unable to turnover over the money or why they should not be held in contempt of court. Furthermore, Receiver argued that Urban's officers continued to withhold essential, pertinent information as to the transactions and financial dealings of Urban, and specifically the turnover funds. In support, the Receiver points to the testimonials of Mr. Terzakis and Mr. Mulder in which they repeatedly contradict one another, blame one another and plead complete ignorance. The problem with this position is that Mr. Terzakis and Mr. Mulder, along with Ms. Gardner were the individuals in charge of Urban and who signed the financial instruments and documents. Thus, for them to assert that they did not know what was occurring, what they were signing or where the money went is neither credible nor believable.

At the motion for turnover of funds, the defendants vehemently objected to the turn over of any funds. However, as discussed in the turnover order, the problem with their

position is that the defendants did not offer a single, substantive basis for denial of the motion. Instead, throughout the proceedings the defendants repeatedly proffered procedural objections as to the appropriateness of the Receiver's motion, at this juncture. The defendants maintained that they were not given adequate notice of the hearing, that the court lacked jurisdiction over all indispensable parties and that the court converted an evidentiary hearing into a final hearing on the merits. The court considered these objections, but held that the motion for turnover would proceed.

Nonetheless, the defendants refused to participate in the proceedings on a substantive level. Apparently, the defendants believed that their procedural objections were sufficient, in order to defeat the motion for turnover of funds. However, the court was presented with a mountain of evidence in support of the amended motion for turnover, and no substantive proof to refute the allegations. Master and the other defendants collected monies for specific purposes – for payment of real estate taxes, for mortgage payments and for receipt of a lease termination payment. Those funds were for specific purposes. The funds were to be placed in segregated accounts for those purposes. The defendants had a fiduciary duty to do so. They did not fulfill that fiduciary duty. Instead, the funds wound up at Urban and none of Urban's principals seemed to be able to enlighten the court why this occurred or where the money went. As such, faced with this undisputed evidence the court granted the motion for turnover of funds.

Now, in an apparent second bite of the apple, Urban and its' officers attempt to present evidence as to the location and history of the turnover funds, at the rule to show cause hearing. Despite the untimely nature of this

testimony, the defendants were no less evasive and uncertain as to the history and dealings of Urban. Urban and its' officers still maintain that they have no idea where the turnover funds are located or who was responsible for managing, moving or transacting the funds. The problem with this position is that these defendants were the individuals in charge of funds. And, the funds are missing.

Thus, these defendants are either (1) concealing the location of the funds; (2) the finds are no longer in their possession, but they know where they went or (3) they do not know where the funds went, but they should because they were in charge of handling them. Under any scenario, the defendants need to be more transparent with respect to the turnover funds. And until they do so, the court is forced to hold them in contempt of court.

As such, the court finds Urban and its' officers, Mr. Terzakis, Mr. Mulder and Ms. Gardner in contempt of court. Accordingly, upon the entry of this order the aforementioned individuals shall be fined in the amount of $2500 each per day until such time that they either comply with the turnover order and tender the funds to the Receiver or provide the court with a detailed financial history of the turnover funds, which the court accepts.

Finally, on February 13, 2003, the Receiver filed a third party complaint in this matter. Subsequently, certain third-party defendants filed a motion for substitution of judge as of right. These motions are currently being briefed. As a result of the substitution of judge motions, on March 13, 2003, Master and Urban, defendants in the underlying action, filed an objection to entry of any ruling or order on rule to show cause. The defendants argue that the court should not rule because a valid, timely motion

for substitution of judge has been filed and, the entire matter shall be reassigned prior to this court ruling on the rule to show cause hearing. However, proofs on the rule to show cause hearing were completed at least one week prior to the presentment of the motions for substitution of judge. This court heard the entire proceeding and received all of the evidence; thus, to ask the court to stay its ruling on this matter appears to be blatant forum-shopping, in addition to a colossal waste of judicial time and resources. As such, the defendants' objection to entry of any ruling or order on rule to show cause shall be denied. A contempt hearing is separate and apart from the case-in-chief. It is a hearing of its own.

## CONCLUSION

Based on the foregoing, his hereby ADJUDGED ORDERED and DECREED that:

1. Mr. Terzakis, Mr. Mulder and Ms. Gardner are found to be in contempt of court;

2. Mr. Terzakis, Mr. Mulder and Ms. Gardner shall each be fined in the amount of $2500 per day until such time that they either comply with the turnover order and tender the funds to the Receiver or provide the court with a detailed financial history of the turnover funds, which the court accepts;

3. The defendants are ordered to comply with this order immediately and the imposition of the $2500 fine shall begin to accrue as of April 8, 2003; and

4. The defendants' objection to entry of any ruling or order on rule to show cause is DENIED.

/s/ Aaron Jaffe

DATE HON. AARON JAFFE

**ORDER**

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

| | |
|---|---|
| Anderson Dundee 53, et al. | |
| v. | No. 02 CH 0086 |
| Manager Dundee 53, et al. | |

**ORDER**

(Filed Jan. 3, 2003)

This matter came to be heard on the Receiver's Motion to clarify the December 12, 2002 Order,

IT IS HEREBY ORDERED:

The Order of December 12, 2002 is amended *nunc pro tunc* to identify John Terzakis, Rudy Mulder and Roxanne Gardner as the officers of Urban to whom the Order applies.

This matter is set for status on Jan. 13, 2003 at 10:00 a.m.

Atty. No.: 90784

Name: Sonnenschein

Atty. for: Receiver

Address: 8000 Sears Tower

City/State/Zip: Chicago, 60606

Telephone: 876-2390

ENTER:

Judge Judge's No.

**DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

**COUNTY DEPARTMENT, CHANCERY DIVISION**

| | |
|---|---|
| ANDERSON DUNDEE 53 L.L.C., et al., | ) |
| Plaintiffs, | ) |
| v. | ) No. 02 CH 0086 |
| MANAGER DUNDEE 53, INC., et al., | ) |
| Defendants. | ) |

**ORDER**

(Entered Dec. 19, 2002)

This matter came to be heard on status and the Receiver's motion for approval of his Fifth Report, dated December 12, 2002, and the payments to the Receiver and his counsel provided for therein; and the Receiver having asked for clarification of the Court's December 12, 2002 Order, and the Court having heard the arguments of counsel;

IT IS HEREBY ORDERED:

1. The Receiver's Fifth Report and the payment of fees provided for therein is approved; and

2. The Order of December 12, 2002 is hereby clarified to reflect that the obligation to turn over $3,336,423.01 to the Receiver Bruce Heller is a joint obligation of Urban Investment Trust and its officers, Rudy Mulder and John Terzakis, which may be enforced against any or all of them.

ENTERED

/s/ Aaron Jaffe
JUDGE

Prepared by:

Wayne R. Hannah, Jr.
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, IL 60606
312-876-8000
Attorney No. 90784

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

| | | |
|---|---|---|
| ANDERSON DUNDEE 53 L.L.C., et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | 02 CH 0086 |
| MANAGER DUNDEE 53, INC., et al., | ) | |
| Defendants. | ) | |

**ORDER**

(Entered Dec. 12, 2002)

This matter is before the court on the Receiver Mr. Bruce Heller's (the "Receiver") amended motion for turnover. The Court is fully advised in the premises having heard witnesses' testimony and received documents into evidence.

On March 20, 2002, Plaintiffs filed a First Amended Complaint for Declaratory Judgment, Constructive trust, Accounting and Other Relief against MASTER DUNDEE 53, LLC ("Master") and other defendants. Master is the master lessee of the Honeywell property located at 1400-1500 W. Dundee Road, Arlington Heights, Illinois (the "Honeywell property"), which is the crux of this matter. On January 25, 2002, Mr. Bruce Heller (the "Receiver") was appointed as the Receiver to manage the Honeywell property. Subsequently, the Receiver filed this motion seeking an order compelling Defendant URBAN INVESTMENT TRUST ("Urban") to turn over funds received by MASTER DUNDEE 53, LLC ("Master") for the benefit

of the Honeywell property, and thereafter allegedly transferred to Urban at the direction of John Terzakis and/or Rudy Mulder, Urban's principals.

Specifically, those funds include $747,681.34 that Master allegedly received precisely for payment of taxes, a $1,500,000 lease termination payment, and a $1,088,741.67 payment used to reduce the balance on a note held against the Honeywell property. The Receiver maintains that Urban now holds these funds as a constructive trustee for the benefit of the Honeywell property, and should be ordered to turn over said funds. The Receiver asserts that the testimony and documentary evidence presented to the court validate these allegations and entitle the Receiver to the funds. In addition, the Receiver states that this court possesses the equitable authority to order the turn over of funds, for the purpose of managing and maintaining the Honeywell property.

Not surprisingly, the Defendants vehemently object to the turn over of the funds. However, the problem with the Defendants' position is that it has not offered a single, substantive basis for denial of the motion. Instead, throughout the proceedings the Defendants repeatedly proffered procedural objections as to the appropriateness of the Receiver's motion, at this juncture. The Defendants maintain that they were not given adequate notice of the hearing, that the court lacks jurisdiction over all indispensable parties that the court converted an evidentiary hearing into a final hearing on the merits. During the proceedings, the court repeatedly acknowledged the Defendants' objections, but stated that the motion for turnover would proceed because the court was concerned about the present viability of the Honeywell property. Nonetheless, for all intensive purposes, the Defendants

refused to participate in the proceedings on a substantive level. As such, the court is presented with a mountain of evidence in support of the amended motion for turnover, and no substantive proof to refute the allegations.

Master and the other defendants collected monies for specific purposes – for payment of real estate taxes, for mortgage payments and for receipt of a lease termination payment. Those funds were for specific purposes. These funds were to be placed in segregated accounts for those purposes. The Defendants had a fiduciary duty to do so. They did not fulfill that fiduciary duty. Instead, the funds wound up at Urban and none of Urban's principals seem to be able to enlighten the court why this occurred or where the money went. One would think that principals and fiduciaries, in this type of situation, would be more forthcoming, or at the very least more knowledgeable and informed, as to the circumstances entailing this situation.

Accordingly, the court finds no basis to deny the Receiver's amended motion for turnover. Again, the court has considered the Defendants' procedural objections; however, it finds that they are unsubstantiated and not an adequate basis to deny the motion. In this matter, the court has not made any final determination of any kind. However, in the face of the allegations and evidence presented by the Receiver, the court, if at all possible, will not permit the Honeywell property to deteriorate and degenerate during the entire duration of these proceedings. As such, the Receiver's amended motion for turnover shall be granted, and Urban and its' officers are directed to transfer the aforementioned funds, in the amount of $3,336,423.01, to the Receiver Bruce Heller. Upon receipt of the funds, the Receiver shall be barred from using,

disbursing or transferring the funds without further order of the court.

Based on the foregoing, it is hereby ADJUDGED ORDERED AND DECREED that the Receiver Mr. Bruce Heller's amended motion for turnover is GRANTED.

Accordingly, the court finds that there is no just reason for delaying either enforcement or appeal or both of this order.

/s/ Aaron Jaffe
DATE HON. AARON JAFFE

101867

**SUPREME COURT OF ILLINOIS**
**CLERK OF THE COURT**
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

March 29, 2006

Mr. Mark W. Schroeder
Attorney at Law
7450 Quincy Street
Willowbrook, IL 60527

No. 101867 – Anderson Dundee 53 L.L.C., et al., etc., respondents, v. John Terzakis et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 20, 2006.